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BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **NORCROSS SERVICE STATIONS, INC.,** **Respondent.**	**Docket No. FMCSA-2000-7658-7** **(Western Service Center)**

ORDER

1. *Background*

On March 29, 2000, Nevada's State Director, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Norcross Service Stations, Inc. (Norcross), which assessed a civil penalty of $20,170 for two alleged violations of the Hazardous Materials Regulations (HMRs): one alleged violation of 49 CFR 172.704(c)(2) - in that Norcross failed to retrain hazardous material employees every three years; and one alleged violation of 49 CFR 180.407(c)(2) - in that Norcross filled, offered, or transported a DOT specification cargo tank before it had successfully completed a required test or inspection.[1]

The Field Administrator for FMCSA's Western Service Center argued that Norcross did not submit a timely reply to the Notice of Claim. He stated that Norcross was required to have served its reply by April 18, 2000 - 15 days from the service date of the Notice of Claim pursuant to 49 CFR 386.14(a), to which is added 5 days pursuant to 49 CFR 386.32(c) because the Notice of Claim was served by mail.[2] The Field Administrator contended that although

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[1] Exhibit A to "Answer To Petitioner's Petition For Reconsideration."

[2] "Answer To Petitioner's Petition For Reconsideration," at 2.

Norcross did submit two replies, one dated April 27, 2000,[3] and one received June 26, 2000,[4] both were late and should be discounted. On June 20, 2000, the Field Administrator issued a Final Agency Order for Norcross's failure to submit a timely reply, demanding that the $20,170 civil penalty be paid within 30 days of Norcross's receipt of that Order.

By letter dated July 10, 2000, Norcross submitted a Petition For Reconsideration of the Final Agency Order (Petition For Reconsideration). On September 26, 2000, the Field Administrator submitted an Answer to the Petition For Reconsideration. In it, the Field Administrator acknowledged that the civil penalty amount derived by the Uniform Fine Assessment (UFA) for the second alleged violation was in error, resulting in a reduction of the total civil penalty from $20,170 to $13,300. He contended that a memorandum dated September 22, 2000, to the Chief, Finance Division [FMCSA], transmitting the terms of the final order, was an Amended Final Order.[5] He maintained that the correction in the civil penalty amount had no bearing on the timeliness of Norcross's reply to the Notice of Claim and that the amount of the penalty actually being claimed against Norcross is the corrected, lower amount of $13,300. The Field Administrator concluded that Norcross should not be allowed a second chance to file its reply.

On October 23, 2000, Norcross submitted a "Motion For Reconsideration of Amended Final Order and Reply to Respondent's Answer to Petitioner's Petition for Reconsideration of Original Final Order" (Motion For Reconsideration). It also filed a Motion to stay the

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[3] Exhibit C to "Answer To Petitioner's Petition For Reconsideration."

[4] Exhibit D to "Answer To Petitioner's Petition For Reconsideration."

[5] "Answer To Petitioner's Petition For Reconsideration," at 5, referring to Exhibit G.

effectiveness of the Amended Final Order while the Second Motion For Reconsideration was pending. In the Motion For Reconsideration, Norcross argued: (1) because the agency discovered one error, and only as a result of the Petition For Reconsideration, a hearing should be granted so that the case may be reviewed for other errors and mistakes; (2) the auditor requested information regarding the training of employees for one year only, not the three years required by the regulation under which Norcross was charged; (3) agency employees told Norcross not to request a hearing and that it would receive a minimal fine by negotiating a settlement; (4) the agency offered Norcross a settlement of $15,000, which is greater than the corrected civil penalty assessment, thereby leading Norcross to believe that the agency did not negotiate in good faith; (5) Norcross believed that the tanks in question with regard to the second alleged violation are exempt from the regulations because of their age and size; (6) additional time for reply, until April 26, 2000, should have been added because the agency does not count Saturdays, Sundays, or Federal holidays; and (7) a new time for requesting a hearing should run because the agency amended its final order. Norcross also submitted the sworn affidavit of Lyle Norcross, Respondent's owner and operator in support of these arguments. Included in the affidavit was Mr. Norcross's statement that although he had requested a hearing via various telephone conversations with agency employees, he was informed by them that he really did not want to have a hearing; he stated that he was also told that it was in his best interest to negotiate a settlement because those who did had better results than at a hearing. He further asserted that even though the regulations provided for a minimum $250 civil penalty for hazardous materials violations, the agency told him that it could not accept $250 in settlement for each alleged violation because they were hazardous materials violations.

2. *Ruling*

The Field Administrator is correct that the last day that Norcross could have replied to the Notice of Claim was April 18, 2000. Norcross appears to be confused about whether Saturdays, Sundays, or Federal holidays are counted. Pursuant to 49 CFR 386.32(a), "[a]ll Saturdays, Sundays, and legal Federal holidays except those falling on the last day of the period shall be computed." Since the Notice of Claim was served on March 29, 2000, which was a Thursday, 15 days from that date was April 13, 2000, which was a Friday. The additional five days that are added to this period because the Notice of Claim was served by mail brought the last date for Norcross's mailing of a reply to April 18, 2000, which was a Wednesday. Since neither April 13 nor April 18 was a Saturday, Sunday, or legal Federal holiday, those days were not excluded from the time calculations. And the regulations state that failure to request a hearing within 15 days after a claim letter is served shall constitute a waiver of any right to a hearing.[6]

Moreover, The Notice of Claim warned Norcross that "A WRITTEN REPLY MUST ALSO BE SUBMITTED IN ACCORDANCE WITH 49 C.F.R. 386.14, AND THE REPLY TO THIS NOTICE OF CLAIM WILL NOT BE WAIVED."[7] It further advised Norcross that if it chose to request a hearing, it must file a written reply within 15 days.[8] (Emphasis added.) Norcross admits, however, that it made several requests for hearing by telephone, and that its first written request was not made until April 27, 2000, which was beyond the deadline for a

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[6] 49 CFR 386.14(b)(2).

[7] Exhibit A to "Answer To Petitioner's Petition For Reconsideration."

[8] *Id.*

reply.

The Field Administrator is wrong, however, when he said that the reduction in the civil penalty amount had no bearing on the timeliness of Norcross's reply. Norcross may have been late in replying to the Notice of Claim as issued on March 29, 2000, but the agency took that Notice of Claim out of play when it revised the civil penalty amount that it was claiming. It was not sufficient for the agency merely to have changed the civil penalty amount as a *fait accompli*; it was required to have reissued the Notice of Claim with the revised civil penalty. Not having done that, Norcross cannot be considered to have defaulted. Therefore, I am vacating the Final Agency Order. And if I were to consider Appendix G to the Field Administrator's "Answer To Petitioner's Petition For Reconsideration" to be an Amended Final Order, which I do not, I would vacate that as well.[9]

With regard to Norcross's allegations of agency misrepresentations to Lyle Norcross, a respondent's rights are contained in writing in the Rules of Practice, and there is nothing that an agency employee may say that can eliminate those rights. Nevertheless, I direct the Field Administrator to assure that agency personnel do not attempt to circumvent any right that a respondent has under our regulations.

It Is So Ordered.

Julie Anna Cirillo
Acting Chief Safety Officer
Federal Motor Carrier Safety Administration

11/13/00
Date

[9] The State Director may reissue the Notice of Claim with the revised civil penalty amount. If he does so, and Norcross wishes to request a hearing, it must submit a written reply pursuant to 49 CFR 386.14(a), 49 CFR 386.14(b)(1) - (4), and this Order. I note that neither of its "replies" contained a negotiation statement or a certificate of service.

CERTIFICATE OF SERVICE

This is to certify that on this 14 day of November 2000, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Douglas R. Hill, Esq. Attorney for Norcross Service Stations, Inc. 440 Ridge Street, Suite 2 Reno, NV 89201	One Copy U.S. Mail
Mr. Lyle Norcross, President Norcross Service Stations, Inc. P.O. Box 150426 Ely, NV 89315	One Copy U.S. Mail
Martia Santos Fox, Esq. Agency Counsel, FMCSA 201 Mission Street, Suite 2100 San Francisco, CA 94105	One Copy U.S. Mail
Mr. William Bensmiller, State Director Federal Motor Carrier Safety Administration 705 North Plaza Street, Suite 220 Carson City, NV 89701	One Copy U.S. Mail
Joanne Haller Federal Motor Carrier Safety Administration 201 Mission Street, Suite 2100 San Francisco, CA 94105	One Copy U.S. Mail
Julie Anna Cirillo Acting Chief Safety Officer Federal Motor Carrier Safety Administration Attention: Steven B. Farbman, Esq. Adjudications Counsel, FMCSA 400 7th Street, SW, Room 4213 Washington, D.C. 20590	One Copy Personal Delivery

Docket No. FMCSA-2000-7658

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